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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³

Debtors.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**OBJECTION OF USACM
LIQUIDATING TRUST TO DOUBLE
COUNTED CLAIMS FILED BY THE
MCQUERRY FAMILY TRUST; AND
CERTIFICATE OF SERVICE**

Date of Hearing: December 18, 2009
Time of Hearing: 1:30 p.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

order disallowing that portion of the each Proof of Claim filed by the McQuerry Family Trust ("McQuerry") identified in Exhibit A attached hereto (the "McQuerry Claims"), which was double counted by the claims agent.

The McQuerry Claims were originally categorized as secured claims, as claimed by McQuerry. The excerpt below from Proof of Claim No. 10725-02241 is typical of the McQuerry Claims:

<input type="checkbox"/> Other _____	
2 Date debt was incurred <u>6/01/07</u>	3. If court judgment, date obtained <u>50,000</u>
4 Classification of Claim Check the appropriate box or boxes that best describe your claim and state the amount of the claim at the time case filed See reverse side for important explanations	
Unsecured Nonpriority Claim \$ _____ <input type="checkbox"/> Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it or if c) none or only part of your claim is entitled to priority	Secured Claim <input checked="" type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff) Brief Description of Collateral <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any \$ _____
Unsecured Priority Claim <input type="checkbox"/> Check this box if you have an unsecured claim all or part of which is entitled to priority Amount entitled to priority \$ _____ Specify the priority of the claim <input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B) <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,000),* earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(5)	<input type="checkbox"/> Up to \$2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____) *Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment
5 Total Amount of Claim at Time Case Filed \$ _____ (unsecured) (secured) (priority) (Total) <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.	

In March 2007, the USACM Trust objected to all secured claims filed by direct lenders, including the McQuerry Claims. The Court sustained the objections and converted the secured claims into unsecured claims. The McQuerry Claims, however, are now listed on the Claims Registry as an unsecured claim for double the intended amount as listed on each proof of claim. To correct the situation, the USACM Trust objects to the McQuerry Claims and asks that the Court disallow half of each Claim as listed in Exhibit

1 A. This Objection is supported by the Court's record and the Declaration of Edward M.
2 Burr in Support of Omnibus Objections to Duplicate Proofs of Claim (the "Burr Decl.")
3 filed with the Court today.

4 **I. JURISDICTION**

5 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
6 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
7 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007. The statutory predicate for
8 the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

9 **II. BACKGROUND**

10 On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third
11 Amended Joint Chapter 11 Plan of Reorganization" as Modified Herein [Docket No. 2376]
12 (the "Confirmation Order"). Under the Plan, the USACM Trust is the successor to
13 USACM with respect to standing to seek allowance and disallowance of Claims. The
14 USACM Trust exists as of the Effective Date of the Plan, which was March 12, 2007.
15 Geoffrey L. Berman is the Trustee.

16 **III. APPLICABLE AUTHORITY**

17 Under the Bankruptcy Code, any Claim for which a proof of claim has been filed
18 will be allowed unless a party in interest objects. If a party in interest objects to the proof
19 of claim, the Court, after notice and hearing, shall determine the amount of the Claim and
20 shall allow the Claim except to the extent that the Claim is "unenforceable against the
21 debtor . . . under any . . . applicable law for a reason other than because such claim is
22 contingent or unmatured." 11 U.S.C. § 502(b).

23 The USACM Trust is entitled to object to proofs of claim under 11 U.S.C. § 502(a).
24 This objection is timely under the confirmed Plan, as the deadline for such objections has
25 been extended to February 4, 2010, by this Court's orders.
26

A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate burden of proof as to the validity of a proof of claim “remains at all times upon the claimant.” *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039 (9th Cir. 2000).

IV. OBJECTION TO PART OF THE DOUBLE COUNTED CLAIMS

The McQuerry Claims were each filed as a secured claim. The excerpt below from Proof of Claim No. 10725-02241 is typical:

<input type="checkbox"/> Other _____	
2 Date debt was incurred <u>6/01/07</u>	3. If court judgment, date obtained <u>50,000</u>
4 Classification of Claim Check the appropriate box or boxes that best describe your claim and state the amount of the claim at the time case filed See reverse side for important explanations	
Unsecured Nonpriority Claim \$ _____ <input type="checkbox"/> Check this box if a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it or if c) none or only part of your claim is entitled to priority	Secured Claim <input checked="" type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff) Brief Description of Collateral <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any \$ _____
Unsecured Priority Claim <input type="checkbox"/> Check this box if you have an unsecured claim all or part of which is entitled to priority Amount entitled to priority \$ _____ Specify the priority of the claim <input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B) <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,000),* earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(5)	<input type="checkbox"/> Up to \$2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____) <small>*Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment</small>
5 Total Amount of Claim at Time Case Filed \$ _____ <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.	

In March 2007, the Trust objected to all secured claims. The Court ultimately entered several orders converting the secured claims into unsecured claims. Consequently, the McQuerry Claims are listed in the Claims Registry as unsecured.

The backup documentation provided with the McQuerry Claims includes a form titled "Exhibit A", which McQuerry used to establish the precise amount of its claim. Below is an excerpt from Exhibit A to Proof of Claim No. 10725-02241:

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EXHIBIT A	
To Proof Of Claim	
A. <u>Amount Of Claim</u>	
1 Total Amount Invested With USA Commercial Mortgage	<u>50,000</u>
2 Interest Due From March 1, 2006 through April 12, 2006	<u>1,083.33</u>
3 Minus total amount of previously filed A-4 claims by Debtor for Diverted Principal ¹	<u>[Unknown]</u>
4 TOTAL CLAIM (line 1 plus (+) line 2 minus (-) line 3):	<u>51,083.33</u>

Thus, based upon the face of the Proof of Claim No. 10725-02241 above, and Exhibit A attached to it, McQuerry clearly intended to assert a single claim for \$51,083.33. The claims register, however, lists the total amount for Proof of Claim No. 10725-02241 as \$102,166.66, exactly double the intended amount.

The same is true for every McQuerry Claim listed on Exhibit A, attached: the amount for each claim listed in the claims register is exactly double the amount McQuerry requested in the corresponding proof of claim. (Burr Decl. ¶ 7.) **Exhibit A** identifies the claimant, the claimant's address, what is currently listed in the claims registry as the total amount of the claim for purposes of distribution, and the amount of the claim that the USACM Liquidating Trust is objecting to as duplicative. (Burr Decl. ¶ 7.)⁴

⁴ The USACM Trust is not objecting to that portion of any of the filed claims that address diverted principal, as in Exhibit A to the sample proof of claim above.

1 Accordingly, the USACM Trust objects to the allowance of the proofs of claim
2 listed on Exhibit A to the extent those claims were incorrectly doubled when entered into
3 the Claims Registry. If the Court grants this objection, one half of the remaining
4 unresolved amount of the proof of claim will be disallowed.

5 This objection is without prejudice to any other objection by any party in interest,
6 including the USACM Trust.

7 **V. CONCLUSION**

8 The USACM Trust respectfully requests that the Court disallow the Double
9 Counted Claims listed in **Exhibit A** in an amount that is half of the remaining unresolved
10 claim amount. The USACM Trust also requests such other and further relief as is just and
11 proper.

12 Dated: November 13, 2009.

13 LEWIS AND ROCA LLP

14
15 By /s/ Marvin Ruth (#10979)

16 Rob Charles, NV 6593
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25
26

LEWIS
AND
ROCA
LLP
LAWYERS

Copy of the foregoing and the pertinent
portion of Exhibit A mailed by First
Class postage prepaid U.S. mail on
November 13, 2009 to:

All parties in interest listed on
Exhibit A attached

LEWIS AND ROCA LLP

/s/ Leilani Lista